

NTSB Order No.
EM-121

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 28th day of June, 1985

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

DONALD J. OLDOW Appellant

Docket ME-110

OPINION AND ORDER

Appellant challenges an October 16, 1984 decision of the Vice Commandant (Appeal No. 2373) affirming a suspension of his merchant mariner's license (No. 005802) for two months on six months' probation. The suspension had been ordered by Administrative Law Judge Roscoe H. Wilkes on April 25, 1983, following the completion of an evidentiary hearing on January 5, 1983.¹ The law judge had sustained a charge of negligence on finding proved a specification alleging that the appellant "while serving as operator aboard M/V SHAMAN, under authority of [his mariner's license] did, on 22 July 1982, fail to properly navigate the vessel in the confined waters adjacent to Knights Island, Prince William Sound, AK thereby contributing to the grounding of the vessel." On appeal appellant contends, among other things, that the conclusions that he was acting under the authority of his license at the time of the grounding and that his handling of the vessel was negligent are clearly erroneous. Based on our review of the record and pleadings, we have concluded, as discussed below, that appellant has not established error in the Vice Commandant's disposition of the case. We will, therefore, deny the appeal and affirm the suspension of appellant's license on probation.

Appellant contends that his license is not subject to the Vice Commandant's suspension revocation jurisdiction in regard to the subject incident because the single licensed operator required to be aboard pursuant to the vessel's certificate of inspection was

¹Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

his wife, not him.² Accordingly, he maintains that he cannot be considered to have been acting under the authority of his license because it was not "required by law" within the meaning of 46 CFR 5.01-35.³ We find appellants contention to be without merit on the facts of this case.

There appears to be no dispute that Mrs. Oldow, a licensed operator, ordinarily functions as master of the SHAMAN, a 43 foot pleasure and fishing vessel she owns jointly with appellant, at least on the charters she conducts when appellant is otherwise pursuing his full-time occupation as a marine pilot.⁴ Further, it does not appear that appellant's presence aboard the SHAMAN on this voyage altered Mrs. Oldow's responsibility for the overall general management of the vessel in accordance with the terms of the charter that had been arranged by her and the geologist passengers, one of whom was the Oldow's son. At the same time, however, and notwithstanding Mrs. Oldow's testimony that it was a great "help" to her to have her husband at the helm from time to time, we see no credible indication in the record that during the periods appellant was at the wheel, his immediate navigational judgments were subject to Mrs. Oldow's supervision. Unless they were, in our judgment, the assertion, in effect, that the vessel was being navigated

²The certificate of inspection required two licensed operators but "...when [the vessel is] operating not more than 12 hours in any 24-hour period the vessel may be operated with 1 ocean operator..." The instant grounding occurred on the second day of what was to have been a three or four day voyage. During those two days, the vessel had been underway for less than 12 hours, so only one licensed operator was required to be aboard, according to appellant. Our disposition of the case makes it unnecessary for us to decide whether, as the law judge concluded, the vessel was being operated while it was at anchor overnight.

³46 CFR 5.01-35 states, in relevant part, that:

"A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document held by him either when the holding of such license, certificate or documents is required by law or regulation or is required in fact as a condition of employment."

⁴Mrs. Oldow has been listed as master on the vessel's certificate of registration since 1977. She received her Operator's license in 1976. Mr. Oldow has been a merchant seaman for over 40 years and holds the superior license of master pursuant to which he can serve as operator of the M/V SHAMAN.

pursuant to Mrs. Oldow's operator's license alone cannot be sustained, for she was not continuously or exclusively responsible for the vessel's navigation.

We recognize that a requirement that a vessel have a licensed operator aboard does not mean that the individual who holds such a license must physically be at the wheel whenever the vessel is underway. Rather, it means that there always must be someone aboard who is responsible at all times for the vessel's navigation, by virtue of his or her licensed status, without regard to who is actually steering the vessel at any given point in time.⁵ That type of responsibility, however, as the Vice Commandant notes, is a matter of navigational control rather than vessel management. As a result, when the navigation of a vessel has been shared by two or more individuals who are licensed to act as operator, each of them, during his or her turn at the helm, is properly considered to have been acting under the authority of his license unless it is affirmatively shown that his navigational judgment within the relevant time frame was subordinate to that of another license holder aboard the vessel. No such showing was made in this proceeding.

Appellant, a licensed master and marine pilot, was at the helm at the time of the grounding and had been navigating the vessel for several hours before the incident. Although there appears to have been some discussion with Mrs. Oldow earlier in the day concerning what course would best serve the interests of the geologists who wanted to observe rock formations along the shoreline, we find no support in the record for any finding either that Mrs. Oldow exercised an oversight role with regard to navigation while appellant had the wheel or that appellant during such periods did not have full responsibility for the vessel's navigation. In sum, we find no error in the conclusion to the effect that appellant was acting under the authority of his, not his wife's, license when the grounding occurred.

We also find no error in the conclusions that appellant did not rebut the presumption of negligence that arose by virtue of the vessel's grounding on a rock in an area of charted rocks and that, apart from any presumption, appellant's navigation of the vessel was negligent.

⁵Thus, while the wheel can be lawfully entrusted to an unlicensed individual, the obligation to insure the vessel's safe navigation remains with the licensed operator, and the negligence of the unlicensed individual may be attributable or chargeable to the licensed operator.

At the hearing appellant maintained that the grounding occurred as a result of an uncharted current, estimated by him to have had a strength of some 3 knots and running opposite to the charted flood current, and which, unbeknownst to him, set his vessel toward the shore. He asserted that but for this unexpected current, the vessel, given the heading he was steering, would have remained far enough from the shoreline that the rocks on the reef extending out from the shore would have been passed safely. Although appellant takes issue with the Vice Commandant's view that "[t]he evidence does not show that this current was so strong or encountered so suddenly that the vessel could not have maintained its course" (Vice Commandant's Decision at 7), we think the Vice Commandant's point which appears in the context of evaluating appellant's evidence to rebut the presumption of negligence the fact of the grounding raised is well-taken. To prevail it was incumbent on appellant to show more than that there may have been an unexpected current acting on the vessel pushing it toward the shore. He was required, in our judgment, to show that he was excusable unaware not just of the current, but also of the fact that the vessel, for whatever reason, was closer to the shore, and thus to the rocks, than either he intended it to be or could have been prevented from happening. As the Vice Commandant put it (id.), "[h]ad Appellant known his position accurately, he would have been aware that he was off course and could have compensated." In other words, given appellant's knowledge of the charted rocks, the effects of an unexpected current would have been identified and corrected for had appellant been paying closer attention to his distance from the shore. No explanation for this inattention was offered, save appellant's apparent belief that his asserted ability to estimate visually his distance off was adequate in the circumstances. We think the fact of the grounding refutes that belief. In any event, it is apparent that the grounding was not the inevitable consequence of an unexpected current, since it could have been easily counteracted, and, therefore, the presumption of negligence was not overcome.

Similar reasoning compels our affirmation of the conclusion that, regardless of any presumption of negligence, the standard of care exercised by the appellant in connection with this operation was deficient. On the same appellant date had twice transmitted the location in which he later grounded at a time when the rocks along the reef were visible during low tide.⁶ He, therefore, was fully aware of the hazard of allowing the vessel to track too close to shore in that area. Nevertheless, appellant attempted a third passage through the same area at a time when the charted rocks he

⁶The high tide in this area on the date in question was, according to appellant, about 14 feet.

had earlier observed had become submerged or awash by the flood tide. In these circumstances, we perceive no basis for disturbing the Vice Commandant's judgment that appellant's failure to insure with precision, by the use of available radar or otherwise, that the vessel was a safe distance off during that third passage was imprudent navigation.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied, and
2. The orders of the Vice Commandant and the law judge imposing a suspension of appellant's mariner's license on probation are affirmed.

BURNETT, Chairman, Goldman, Vice Chairman and BURSLEY, Member of the Board, concurred in the above opinion and order.